(5)

No. 04-1021

IN THE

Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
Petitioner,

v.

COMMUNITIES FOR EQUITY ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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April 1, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

(1) Whether the Sixth Circuit properly affirmed the district court's detailed, factual determination that the Michigan High School Athletic Association's scheduling of girls' sports only in disadvantageous seasons violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

(2) Whether Plaintiffs' equal protection claim is subsumed by their claim under Title IX of the Education Amendments of 1972, even though this claim was never pressed by MHSAA or decided below, and in fact, MHSAA consistently argued below that it was not subject to Title IX.

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INTRODUCTION

This case concerns the application of well-settled equal protection doctrine to a distinctive factual scenario: the disparate scheduling of girls' sports seasons by the Michigan High School Athletic Association ("MHSAA"). The district court and the Sixth Circuit both held that MHSAA violated the Fourteenth Amendment's Equal Protection Clause by scheduling girls' sports, but not boys' sports, in nontraditional or disadvantageous seasons, without sufficient justification for the differential treatment. The Sixth Circuit's decision is entirely consistent with this Court's precedents and conflicts with no decisions from other circuits. This case thus presents a routine application of this Court's legal standard to record facts that are unique and unlikely to recur, and this Court's review is unwarranted.

MHSAA works hard to fashion issues of law suitable for review, but none exists. First, MHSAA urges the Court to decide whether Title IX provides the exclusive remedy for Plaintiffs' claims. But this claim was never pressed or decided below, and is in fact inconsistent with MHSAA's arguments below that it is not subject to Title IX; thus it cannot be raised for the first time in this Court. As if these were not sufficient grounds for denying review, the district court also found both Title IX and state law violations. As a result, this Court's consideration of the exclusivity issue would not be dispositive. Finally, Title IX is not, in any event, the exclusive remedy here.

Second, MHSAA claims that the case conflicts with this Court's decisions and those of other circuits addressing sex discrimination claims under the Constitution. In fact, this case presents no such conflicts. In its attempts to suggest otherwise, MHSAA mischaracterizes this Court's decision in *United States v. Virginia* [hereinafter *VMI*] and claims that its actions do not constitute facial gender classifications. But MHSAA's argument defies belief, given that the association explicitly

schedules girls' seasons differently from boys' seasons. In any event, the court below correctly applied *VMI* to these facial classifications, holding that *unequal* single-sex programs like the disparate scheduling in this case are unconstitutional. Thus, the Sixth Circuit's decision in no way conflicts with the decisions of this Court or those of other courts of appeals.

STATEMENT OF THE CASE

> *"Boys' sports were in [MHSAA member] schools first and girls' sports, which came later, were fitted around the pre-existing boys' program."*

This statement, made by MHSAA's executive director, captures the essence of this case—the association's discriminatory scheduling of girls' high school sports seasons in the state. Pet. App. 34a.

Since the 1920s, MHSAA has supervised and controlled interscholastic athletics in Michigan. In this role, it regulates almost every aspect of sports in the state, including the area most pertinent to this case—the season in which each sport will be played. Pet. App. 28a-34a. When MHSAA began to sanction and regulate sports for girls in the 1970s, it followed the above "boys-first" philosophy and scheduled the girls' seasons in the months when boys were not playing. This philosophy also extended to sports that were contemporaneously sanctioned for boys and girls, such as soccer. As a result, MHSAA now schedules the seasons for all twelve boys' sports it sanctions during the traditional or most advantageous times of the year, while it schedules six girls' sports during nontraditional or disadvantageous times that are harmful to girls. Specifically, while MHSAA schedules boys' basketball in the traditional, advantageous winter season along with every other state and college in the nation, it schedules

girls' basketball in the fall season. It schedules boys' soccer in the traditional fall season, but girls' soccer in the spring. It schedules boys' tennis in the traditional spring season, but girls' tennis in the fall. It schedules boys' swimming in the traditional winter season, but girls' swimming in the fall. It schedules boys' golf in the fall, but girls' golf in the spring.[1] And it is the only state athletic association in the nation that schedules girls' volleyball in the winter instead of the traditional fall season. Pet. App. 34a-39a.

MHSAA was aware that its "boys-first" scheduling negatively affected girls' participation opportunities and that it could be held legally liable for this discriminatory treatment. Indeed, in the early 1990s, MHSAA studied changes to its scheduling of seasons "mostly to do what is needed for girls, but also in part to keep the MHSAA in a position of choosing its future voluntarily rather than being forced to fight legislated or court-ordered changes in the future if something is not done soon." However, it made no such changes. Pet. App. 38a.

Plaintiffs Communities for Equity (an organization founded by parents and students to promote gender equity in athletics) and individual parents on behalf of their daughters sued MHSAA in 1998. They alleged that MHSAA discriminates against girls in several ways, including the scheduling of sports seasons, in violation of (1) the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (as enforced through 42 U.S.C. § 1983); (2) Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.);

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[1] While MHSAA previously scheduled boys' golf in the traditional spring season, it moved the boys to the fall season in the 1970s because it is easier to obtain tee times and better courses in the fall. When MHSAA began sanctioning girls' golf, it set spring as their season, having previously determined that it was less advantageous. Pet. App. 64a.

and (3) the Elliott-Larsen Civil Rights Act of Michigan state law (M.C.L.A. § 37.2301 et seq.). Before trial, the parties settled all claims except the one involving seasons.

After trial, in which the United States participated as litigating amicus in support of the Plaintiffs, the district court in December 2001 ruled in favor of Plaintiffs on all three claims. The district court's ruling spans almost 100 pages, over 30 of which detail findings of fact about the multiple and significant harms girls suffer as a result of MHSAA's discriminatory scheduling of seasons. Pet. App. 20a-118a. A sample of some of the most harmful findings shows that Michigan girls: (1) lose opportunities to be recruited by college coaches and receive athletic scholarships; (2) lose opportunities to participate in Olympic Development Programs and national club sport programs (e.g., female volleyball players lose 16-20 months of club playing time over a four-year career); (3) have shorter seasons in some girls' sports by as much as 21 days (resulting in less practice time, skill development, and coaching); (4) lose opportunities to participate in special events like March Madness and fall blue-chip basketball shoot-outs; (5) miss out on national publicity, rankings, and All-American honors; (6) lack contemporaneous college and professional role models; (7) cannot compete against teams in neighboring states, which could lessen travel burdens; and (8) endure psychological harm from being treated like "second-class" citizens, resulting in low self-esteem and low life expectations. Pet. App. 39a-77a.

The district court held that MHSAA's alleged reasons for its scheduling of girls' sports—namely, that surveys of schools and girls showed a preference for the current seasons, and that logistical limitations require separate seasons for the sexes to maximize participation—were not supported by the evidence and did not legally justify the harms girls faced. It therefore

ordered MHSAA to reschedule its sports seasons in compliance with the Constitution, Title IX, and Michigan state law by the 2003-04 school year. The district court did not order MHSAA to combine girls' and boys' seasons in any sport, but stated that if MHSAA chose to keep separate seasons, it had to schedule them such that boys and girls equitably share the benefits and burdens of different seasons. Pet. App. 77a-89a, 97a-118a.

The Sixth Circuit affirmed the judgment on the equal protection claim, "thus finding no need to reach the Title IX and state-law issues." After holding MHSAA to be a state actor under this Court's decision in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 51 U.S. 288 (2001), the court wholly adopted the district court's factual findings, stating that the district court "painstakingly discussed each sport at issue and analyzed why play in the non-traditional season harmed female athletes." Next, applying this Court's intermediate scrutiny standard consistent with *VMI*, the Sixth Circuit examined and rejected MHSAA's main argument that separate seasons maximize athletic participation: "The evidence offered by MHSAA . . . does not establish that separate seasons for boys and girls—*let alone scheduling that results in the girls bearing all of the burden of playing during disadvantageous seasons*—maximizes opportunities for participation. . . . [A] large . . . participation number alone does not demonstrate that discriminatory scheduling of boys' and girls' athletic seasons is substantially related to the achievement of important government objectives." Thus, the court held MHSAA had not provided an "exceedingly persuasive" justification for its discrimination. Pet. App. 2a-16a. (emphasis added).

REASONS FOR DENYING THE WRIT

MHSAA's petition raises two issues: (1) whether the Sixth

Circuit properly followed this Court's equal protection analysis, and (2) whether Title IX subsumes Plaintiffs' § 1983 claim. Plaintiffs address these issues in the reverse order because, as a matter of logic, the question of whether a court can even consider the § 1983 claim precedes the question of the appropriate standard of proof for that claim.

I. MHSAA FAILED TO RAISE, AND THE COURTS BELOW DID NOT ADDRESS, WHETHER TITLE IX IS THE EXCLUSIVE REMEDY FOR PLAINTIFFS' INJURIES, AND THIS COURT SHOULD NOT DO SO IN THIS CASE.

A. This Court Should Not Review the Question of Whether Title IX Is the Exclusive Remedy for Plaintiffs' Claims Because It Was Not Pressed or Passed On by the Courts Below.

This Court has consistently stated that it "will not review a question not pressed *or* passed on by the courts below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (emphasis in original); *see also Cooper Indus., Inc. v. Aviall Servs., Inc.*, 125 S. Ct. 577, 585 (2004) ("We . . . do not decide in the first instance issues not decided below."); *Grupo Mexicano v. Alliance Bond Fund*, 527 U.S. 308, 319 n.3 (1999) ("Because this argument was neither raised nor considered below, we decline to consider it.").

During nearly seven years of litigation, MHSAA never mentioned, let alone pressed, the question of whether Title IX provides the exclusive remedy for Plaintiffs' claims, and the courts below never passed on the issue. Indeed, MHSAA's petition to this Court is the first place that even a whisper of this argument has arisen, despite MHSAA's numerous dispositive motions and its 2000 petition to this Court seeking

interlocutory review of a denial of summary judgment.[2]

The reason for this omission is simple: MHSAA has consistently asserted in the courts below that it is not covered by, and thus does not have to comply with, Title IX. MHSAA should not now be allowed to claim that Title IX is Plaintiffs' only remedy when it repeatedly argued that it was not subject to Title IX in the face of multiple rulings by the district court and Sixth Circuit to the contrary. Rather, these circumstances further demonstrate why this Court should decline to review the exclusivity question. *See United States v. Ortiz*, 422 U.S. 891, 898 (1975) (declining to consider an issue raised for the first time in the petition for certiorari and on which petitioner took a contrary position below); *cf. Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (noting general rule that it is not proper to allow petitioner to press an argument that he

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[2] MHSAA defends its failure to raise this issue below by claiming that (1) this Court has jurisdiction to review issues not addressed by the lower court when it would have been futile for petitioner to argue the issue, and (2) the Sixth Circuit necessarily passed on the issue since it addressed the merits of the equal protection claim. Both arguments fail. The two cases MHSAA cites for support of its first point are distinguishable because they involved special circumstances where the Court held petitioners did not waive their privilege against self-incrimination by not raising it earlier because the applicable case law had changed such that asserting the privilege in the cases at hand would reverse petitioners' convictions. *See Grosso v. United States*, 390 U.S. 62, 70-71 (1968); *Leary v. United States*, 395 U.S. 6, 27-29 (1969). No such special circumstances exist here. MHSAA's reliance on *United States v. Williams*, 504 U.S. at 43, for its second point is also misplaced. In that case, the Court essentially considered an issue to have been raised because the petitioner contested it in a case relied on by the lower courts to rule against it and did not concede the correctness of that decision in the current case. Here, MHSAA never raised the exclusivity issue. Moreover, the Court in *Williams* held that it could review the "critical issue" not raised by petitioner because it was expressly decided by the court below. By contrast, the exclusivity issue MHSAA presses in its petition for the first time was never decided by the courts below.

disavowed below unless it was merely a new argument in support of his consistent claim or the argument was addressed by court below).

B. This Case Is a Poor Vehicle to Address MHSAA's Exclusivity Argument Because Two Alternative Grounds Support the Decisions of the Courts Below.

This Court has established that when the course of litigation does not turn on the answer to the question presented, certiorari should be denied. *See Smith v. Butler*, 366 U.S. 161 (1961). Moreover, where alternative grounds exist that support the same outcome regardless of the Court's decision on the question presented, this Court has declined review. *See The Monrosa v. Carbon Black Export*, 359 U.S. 180, 183 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation."); *see also Belcher v. Stengel*, 429 U.S. 118 (1976) (same).

Deciding the exclusivity question presented by MHSAA would not determine the course of litigation here because, in addition to holding that MHSAA violated the Equal Protection Clause, the district court held that MHSAA violated both Title IX and Michigan state law.[3] The Sixth Circuit found it unnecessary to reach these alternative grounds, thereby leaving in place the district court's rulings for the Plaintiffs on these

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[3] Moreover, this Court normally defers to the construction of a state statute given it by the lower courts. *See Brockett v. Spokane Arcades*, Inc., 472 U.S. 491, 499 (1985); *Butner v. United States*, 440 U.S. 48, 57-58 (1979) (Court refused to address state law claim because "federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues"); *Bishop v. Wood*, 426 U.S. 341, 346 n. 10 (1976) (Court is hesitant to overrule decisions by federal courts skilled in the law of particular states).

bases. This case is thus a very poor vehicle to address MHSAA's question of whether Title IX is Plaintiffs' exclusive remedy.

C. Title IX Does Not Provide the Exclusive Remedy for Plaintiffs' Claims.

MHSAA's argument that Title IX subsumes Plaintiffs' § 1983 claim is, in any event, without merit. This Court has made it clear that § 1983 is available as a remedy except in very narrow circumstances, none of which apply to Title IX. Thus, this case presents no conflict with the Court's precedents on this issue.

MHSAA's reliance on *Middlesex County Sewage Auth. v. National Sea Clammers Assoc.*, 453 U.S. 1 (1981), to argue the contrary is misplaced. In *Sea Clammers*, this Court held that the plaintiff could not avoid the administrative enforcement requirements of federal environmental statutes by using § 1983 to enforce those same statutes. Here, by contrast, Plaintiffs do not use § 1983 as a means to enforce a federal statute (i.e., Title IX), but rather to enforce their separate constitutional rights to equal protection.[4] Thus, *Sea Clammers* is simply inapplicable. *See Lillard v. Shelby County Bd. of Ed.*, 76 F.3d 716 (6th Cir. 1996); *Delgado v. Steggall*, 367 F.3d 668 (7th Cir. 2004); *Crawford v. Davis*, 109 F.3d 1282 (8th Cir. 1997); *Seamons v.*

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[4] MHSAA's citations to *Wright v. City of Roanoke Redev. and Housing Auth.*, 479 U.S. 418 (1987) and *Blessing v. Freestone*, 520 U.S. 329 (1997), further demonstrate the error of its argument. Those cases are distinguishable because they addressed whether plaintiffs could use § 1983 to enforce federal statutes that did not include express private rights of action and thus required the Court to determine whether Congress intended to create a federal right that was enforceable through § 1983. There is no such issue here, where Plaintiffs use § 1983 to enforce their constitutional rights to equal protection.

Snow, 84 F.3d 1226 (10th Cir. 1996).

Nor does *Smith v. Robinson*, 468 U.S. 992 (1984), in which the Court held that the Education of the Handicapped Act ("EHA") subsumes a § 1983 claim,[5] support MHSAA's position. The *Smith* Court held that the EHA claims subsumed the § 1983 claim only because (1) the EHA's legislative history indicated that it should be the exclusive remedy; (2) the § 1983 claim was "virtually identical" to the EHA claims; and (3) Congress established a comprehensive enforcement scheme for the EHA. Title IX does not meet any of these three requirements. *Lillard*, 76 F.3d at 723.

First, MHSAA cannot point to any legislative history evincing congressional intent to establish Title IX as an exclusive remedy for sex discrimination. *See Blessing v. Freestone*, 520 U.S. 329, 346 (1997) (defendants bear burden of showing congressional intent to preclude § 1983 claim).

Second, Plaintiffs' equal protection claim is not identical to their Title IX claim for many reasons, including: (1) Title IX covers only entities receiving federal funds, while § 1983 covers all state actors whether or not they receive federal funds; (2) Conditions that violate the Constitution may not necessarily violate Title IX. *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732-733 (1982) (striking down female-only nursing school policy under Equal Protection Clause and noting that Title IX explicitly allows single-sex admissions policies in certain instances); (3) Section 1983 allows recovery against individuals, *see Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982), while most courts have held that Title IX does not.

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[5] Congress promptly responded to the ruling by amending the statute to more expressly state that it did not intend the EHA to displace any other remedies. 20 U.S.C. 1415(f)(1985); *see* H.R. Rep. No. 99-296 at 4 (1985).

See, e.g., Lipsett v. Univ. of Puerto Rico, 864 F.2d 188, 190 (1st Cir. 1998) (indicating that damages under Title IX may be available only from educational institutions, not individuals).

Third, Title IX does not have a comprehensive enforcement scheme. This Court held that an implied right of action exists to enforce Title IX specifically because the statute lacks comprehensive administrative enforcement mechanisms. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). While Title IX regulations allow individuals to file complaints with the Office for Civil Rights ("OCR"), 34 C.F.R. § 106.71, the process does not, for example, require OCR to address claims, allow complainants to present evidence or witnesses, or require remedies tailored to complainants. *See id.* at 706 n.41; *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 76 (1992) (finding private right of action for money damages under Title IX because administrative process would leave complainant "remediless"). Moreover, this Court has consistently held that an administrative process designed to lead to the withdrawal of federal funds is not the kind of comprehensive enforcement scheme required to subsume § 1983 remedies. *See Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 521 (1990); *Wright v. City of Roanoke Redev. and Hous. Auth.*, 479 U.S. 418, 428 (1979). In addition, because Title IX's cause of action is judicially implied, its remedial scheme may be limited by the judiciary. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998). Thus, Title IX's remedial framework is not sufficiently comprehensive to warrant § 1983 preclusion under *Smith*. *See, e.g., Lillard.*

The cases cited by MHSAA in support of its position that Title IX subsumes Plaintiffs' § 1983 claim misconstrue *Sea Clammers* and summarily conclude that Title IX subsumes § 1983 remedies without conducting any of the above analysis. They fail to examine the Title IX enforcement scheme or to

address whether that scheme is inconsistent with the enforcement of constitutional rights under § 1983. Hence, there is no conflict to resolve here.

II. THERE IS NO CONFLICT REGARDING THE APPROPRIATE STANDARD FOR ANALYSIS OF THE EQUAL PROTECTION CLAIM, AND THUS THE PETITION SHOULD BE DENIED.

MHSAA's claim that this case creates a conflict about the legal standards for addressing gender-based discrimination is without merit. This Court in *VMI* articulated the standard for scrutiny of claims like those at issue here, and the Sixth Circuit in this case adhered to that standard. MHSAA's real argument is that the court below incorrectly applied established law to the facts at issue, and MHSAA makes this argument only by ignoring or disputing the analysis and the facts found by the courts below. This case, accordingly, does not warrant review.

A. The Sixth Circuit's Intermediate Scrutiny Analysis Does Not Conflict with the Analysis Articulated by This Court in *VMI*.

The Sixth Circuit adhered to this Court's intermediate scrutiny analysis in *VMI* and properly concluded that MHSAA's scheduling of girls' sports only in disadvantageous seasons violates the Equal Protection Clause.

In *VMI*, 518 U.S. 515 (1996), this Court was asked to decide whether Virginia's exclusion of women from the educational opportunities offered by the Virginia Military Institute violated the Equal Protection Clause. In answering this question, the Court reiterated the heightened standard that must be met to justify gender-based classifications:

> Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is "exceedingly persuasive." The burden of justification is demanding and it rests entirely on the State. The State must show that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.

Id. at 532-33.

The Sixth Circuit strictly adhered to this Court's intermediate scrutiny analysis in holding MHSAA's scheduling of girls' seasons to be unconstitutional. It found that MHSAA treats boys and girls differently in the scheduling of their sports seasons and that this disparate treatment harms girls in numerous ways. The court examined MHSAA's justifications for the disparate scheduling and held that they were not "exceedingly persuasive," ultimately concluding that MHSAA's scheduling of girls' seasons violates the Constitution. Pet. App. 3a-8a, 13a-16a.

B. This Case Presents No Conflict About the Proper Rule of Law that Applies to Gender-Based Classifications.

MHSAA tries to turn its dissatisfaction with the outcome in this case into a conflict about the proper rule of law that applies to gender-based classifications, but there is simply no conflict on this issue. Even more troubling is that in its effort to create a conflict where none exists, MHSAA misstates the relevant facts in this case as well as the applicable law. Plaintiffs address these misstatements below.

1. The Sixth Circuit's Decision Does Not Conflict with This Court's Cases Addressing Sex Discrimination Under the Constitution.

MHSAA's argument that its scheduling of girls' seasons does not constitute a facial gender classification defies belief. Given the single-sex nature of sports teams, MHSAA's scheduling decisions are made entirely on the basis of sex (i.e., the sex of the athletes determines in which seasons they play).[6] The Sixth Circuit's decision on this issue thus accords with this Court's treatment of gender-based classifications. Indeed, it is hard to imagine a clearer facial classification. *See UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197 (1991) ("The policy [at issue] excludes women with childbearing capacity from lead-exposed jobs, and so creates a facial classification based on gender.").

There is also no conflict between the Sixth Circuit's decision and this Court's cases holding that the Equal Protection Clause reaches only purposeful sex discrimination. Because MHSAA's scheduling of girls' seasons is a facial gender classification, Plaintiffs were not required to show any intent to harm female athletes, discriminatory animus, malice or

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[6] MHSAA does not seek to invalidate the separation of sports teams by sex. Indeed, separate sex sports teams have been held constitutionally permissible in the unique context of athletics. *See, e.g., Haffer v. Temple Univ.*, 678 F. Supp. 517, 525 (E.D. Pa. 1987) (noting that separate men's and women's teams are permissible because they "expand substantially the opportunity for women to participate" and that "courts have repeatedly observed . . . that separate and equal athletic programs are constitutionally permissible") (citing several cases); *see also O'Connor v. Board of Education*, 449 U.S. 1301 (1980) (Petition to J. Stevens, Circuit Justice for the Seventh Circuit, to vacate stay) ("Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete . . . .").

any other evidence of motive, whether benevolent or invidious. Rather, Plaintiffs had only to show that MHSAA intended to treat girls differently than boys in scheduling their sports seasons. *See, e.g., Pederson v. Louisiana State Univ.*, 213 F.3d 858, 881 (5th Cir. 2000) ("[The university] need not have intended to violate Title IX, but need only have intended to treat women differently."); *see also Johnson Controls*, 499 U.S. at 199 ("Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates . . . ."). This intent is established simply by the disparate scheduling of girls' sports seasons. *See, e.g., Haffer*, 678 F. Supp. at 527.

The cases MHSAA cites to argue that Plaintiffs should have been required to show discriminatory animus are inapplicable because they are *disparate impact* cases—i.e., cases involving a facially neutral rule with a disparate impact on the basis of sex. *See Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 584 n.2 (1983) (indicating that "intentional discrimination" is synonymous with "disparate treatment" discrimination, which contrasts with "disparate impact" discrimination). In such cases, the Constitution requires a showing of animus to determine "whether the adverse effect reflects invidious gender-based discrimination." *Personnel Administrator v. Feeney*, 442 U.S. 256, 274 (1979) (describing statute at issue as being facially neutral and having a disparate impact on women); *see also Shaw v. Reno*, 509 U.S. 630, 649 (1993) (describing reapportionment legislation as race-neutral on its face).[7]

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[7] MHSAA also cites *Geduldig v. Aiello*, 417 U.S. 484 (1974), to support its argument that its scheduling of girls' seasons is not a facial classification. Plaintiffs believe that case was wrongly decided, and many courts have questioned whether its analysis is still valid in light of the Pregnancy Discrimination Act, 42 U.S.C. § 2000e (k) (2000). *See, e.g., Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983). In any event, *Geduldig* is readily distinguishable because MHSAA's scheduling

MHSAA's claim that the Sixth Circuit's decision here conflicts with this Court's decision in *VMI* must also be rejected. While MHSAA mischaracterizes *VMI* as deciding that separate but equal programs for males and females can satisfy intermediate scrutiny,[8] there can be no dispute about one conclusion the Court reached: separate and *unequal* programs for females are unconstitutional.[9] *See VMI*, 518 U.S. at 553 (rejecting alternative program for women established by state because it was a "pale shadow" of VMI). Because MHSAA's scheduling of girls' seasons is manifestly unequal to its scheduling of boys' seasons for the multiple reasons found by the courts below, the Sixth Circuit correctly held that MHSAA's scheduling is unconstitutional, and its decision in no

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decisions explicitly and on their face divide athletes into two groups—one exclusively female and the other exclusively male.

[8] In fact, the Court did not address the argument that the Constitution permits "separate but equal" educational programming for male and female students. *VMI*, 518 U.S. at 533 n.7. Noting, but not deciding, this question in evaluating Virginia's proposed remedy, the Court found instead that the Virginia Women's Institute for Leadership (VWIL)—the program established by the state as an alternative to admitting women to VMI—was manifestly *unequal* to VMI in both tangible and intangible benefits. *Id.* at 534, 547, 551, 557.

[9] The analysis in athletics cases focuses on whether males and females have been provided with equal participation opportunities, benefits, and services. *See Haffer*, 678 F. Supp. At 525 ("This court's task is to . . . determine whether defendants offer equivalent athletic programs to men and women.") *cf. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413 (December 11, 1979) (describing multiple components involved in assessing Title IX compliance, one of which is scheduling, and stating that "Institutions will be in compliance if the *compared program components* are equivalent . . . .") (emphasis added).

way conflicts with *VMI*.

MHSAA also erroneously claims that the Sixth Circuit deviated from *VMI* by requiring identical, rather than equal, treatment of boys and girls. *See* Pet. 13. But neither the district court nor the Sixth Circuit in this case even suggested that MHSAA must schedule girls' sports in seasons that mirror the boys' seasons. To the contrary, the district court repeatedly stated that MHSAA could schedule girls' and boys' sports in separate seasons as long as the sexes "split advantageous and disadvantageous sports equally." Pet. App. 77a.

MHSAA's attempt to create a conflict with *VMI* by resorting to scare tactics is also unavailing. MHSAA erroneously claims that "[t]he Sixth Circuit's holding in this case radically expands the scope of intermediate scrutiny, and in practical terms will render all gender-separate programs untenable." Pet. 17. Specifically, MHSAA avers that the Sixth Circuit "improperly relieved [Plaintiffs] of [its] burdens by treating every decision implementing a program that happens to be single-gender as a facial gender classification, shifting the burden of proof . . . and requiring an exceedingly persuasive justification." Pet. 19. In fact, MHSAA improperly compares its scheduling decisions, which disadvantage female student athletes, to hypothetical examples of differences given the separate teams where there could be no disadvantage—namely, ordering different uniforms for girls' versus boys' teams, assigning girls' and boys' teams different days of the week to use a weight room, and placing the boys' bathroom to the left of a water fountain and the girls' bathroom to its right.

2. The Sixth Circuit's Decision Does Not Conflict With the Decisions of Other Courts of Appeals.

There is no conflict between the Sixth Circuit's decision

here and the decisions MHSAA cites of the Third, Fourth, Eighth, and D.C. Circuits. Each of these courts applied this Court's intermediate scrutiny analysis and simply reached different conclusions based on the particular facts before them.

First, there is no conflict between the Sixth Circuit's decision in this case and the Fourth Circuit's decision in *VMI*. In trying to demonstrate such a conflict, MHSAA repeats the same arguments it makes above to try to show a conflict with this Court's decision in *VMI*. Therefore, Plaintiffs reference their responses to MHSAA's arguments in Section B.2 above.

Second, there is no conflict with the Third Circuit's decision in *Vorchheimer v. School Dist.*, 532 F.2d 880 (3rd Cir. 1976), *judgment aff'd*, 430 U.S. 703 (1977), which held that a female high school student was not denied equal protection by being denied admission to an all-male high school when she could attend an allegedly equal girls' high school. *Vorchheimer* was decided before this Court's amplification of the intermediate scrutiny standard in *Mississippi University for Women v. Hogan*, and in any event is distinguishable on its facts. Unlike the separate female school that the Third Circuit held to be equal in that case, MHSAA's scheduling of girls' sports seasons here is clearly unequal, as the courts below consistently held.

Finally, MHSAA alleges conflicts with three decisions by the Eighth and D.C. Circuits involving equal protection claims by female prisoners for discrimination in the provision of educational, employment, and other programs and services. But once again, there is no conflict because all of these cases are distinguishable based on their facts, facts that led the courts to conclude that the female and male inmates were not similarly situated. Thus, the plaintiffs in those cases were held not to have viable equal protection claims. In this case, on the other hand, Plaintiffs are clearly similarly situated to the boys who

participate in sports in Michigan schools. Moreover, the courts in the prison cases held that there would be no equal protection violations even if they assumed the female and male inmates were similarly situated, because the two Eighth Circuit cases involved facially neutral rules with a disparate impact on female inmates with no evidence of discriminatory purpose, while the D.C. Circuit case held that the two programs were equal and rejected female prisoners' claims that they were entitled to the identical programs offered to male prisoners. By contrast, this case involves claims of disparate treatment discrimination, and the courts below found MHSAA's scheduling of girls' and boys' sports seasons to be decidedly unequal. *See Keevan v. Smith*, 100 F.3d 644, 647-51 (8th Cir. 1996); *Women Prisoners of the District of Columbia Dep't of Corrections v. District of Columbia*, 93 F.3d 910, 924-27 (D.C. Cir. 1996); *Klinger v. Department of Corrections*, 31 F.3d 727, 732-34 (8th Cir. 1994).

III. IN LIGHT OF THE DECISIONS BELOW, THE PETITION DOES NOT PRESENT ANY ISSUE OF NATIONAL IMPORTANCE.

Given the decisions below, MHSAA's petition does not present for this Court any issue of national importance. In fact, the only issue presented is the application of the constitutional equal protection analysis to the facts of this case, and those facts are unique and unlikely to recur. Indeed, the underlying substance of the case is no longer of national importance, because, to Plaintiffs' knowledge, MHSAA is the only state high school athletic association in the nation that still schedules girls but not boys in disadvantageous athletic seasons. Most notably, it is the only association that schedules girls' basketball in the fall and girls' volleyball in the winter.

CONCLUSION

For all the reasons stated above, the questions presented by MHSAA are not suitable for this Court's review and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 1, 2005